TIA AH LENG

v.

PP

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
DENIS ONG JCA
KC VOHRAH JCA
[CRIMINAL APPEAL NO: W-05-77-99]
22 JULY 2004

CRIMINAL PROCEDURE: *Sentence - Plea of guilty as mitigating factor - Discount on sentence - Accused originally charged under s. 39B Dangerous Drugs Act 1952 - Pleaded guilty to amended charge under s. 12(2) after close of defence - Trial judge imposing maximum sentence of life imprisonment under s. 39A(2) - No discount given for pleading guilty - Whether sentence imposed by trial judge tenable - Whether trial judge can refuse to give discount on sentence - Principles of sentencing in drug-offences*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 12(2) - 13.75kg of heroin - Accused originally charged under s. 39B - Pleaded guilty to amended charge under s. 12(2) after close of defence - Trial judge imposing maximum sentence of life imprisonment under s. 39A(2) - No discount given for pleading guilty - Whether sentence imposed by trial judge tenable - Whether trial judge can refuse to give discount on sentence*

This was an appeal from the decision of the High Court sentencing the accused to life imprisonment and ten strokes of whipping under s. 39A(2) of the Dangerous Drugs Act 1952 ('DDA'). The accused had earlier pleaded guilty to an amended charge under s. 12(2) of the DDA (after the close of the case for the defence) and was therewithal found guilty and convicted. In mitigation, the accused had prayed, *inter alia*, that, being 47 years of age, he was still the sole breadwinner for his wife and four children, and that he would have pleaded guilty much earlier had the original charge been amended before the commencement of the trial. Before the justices of appeal herein, counsel for the accused argued that the accused ought, as is usual, to have been given a discount for pleading guilty, and that as such, the maximum sentence of life imprisonment imposed by the trial judge was irregular – considering that the minimum mandatory sentence under s. 39A(2) of the DDA is five years' imprisonment.

Held (dismissing the appeal)
Per Mokhtar Sidin JCA delivering the judgment of the court:

[1] Although it is an accepted rule of practice that an accused person – who pleads guilty to an offence with which he has been charged – should be given a discount on the sentence that would otherwise have been imposed on him had he been convicted after a trial, yet there are important exceptions to this general rule. Indeed, the offences under the Dangerous Drugs Act 1952 are exceptions to this rule. The Government and the Legislature have taken various and serious steps to control the menace of drug trafficking and its associated crimes, and the courts should play their part by imposing the stringent punishments prescribed therefor by the DDA. (pp 82 c-h, 83 a-h, 84 a-g, 86 c-g & 87 a-c)

[1a] The amount of heroin found in the accused's motorcar was especially large, *ie*, 13.75kg. This was, therefore, an exceptional case in which no discount on the sentence should be given to the accused even though he had pleaded guilty to the amended charge. There was no error of law whatsoever in the sentence meted out by the trial judge. (pp 87 d-g & 88 a)

[Sentence imposed by trial judge affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menjatuhkan hukuman penjara seumur hidup dan sepuluh sebatan ke atas tertuduh di bawah s. 39A(2) Akta Dadah Berbahaya 1952 ('ADB'). Tertuduh sebelum itu telah mengaku salah terhadap pertuduhan terpinda di bawah s. 12(2) ADB (selepas kes pembelaan ditutup) yang berakibat ia didapati bersalah dan disabitkan. Semasa membuat rayuan untuk meringankan hukuman, tertuduh merayu, antara lain, bahawa, pada peringkat umur 47 tahun, beliau masih adalah satu-satunya pencari nafkah untuk isteri dan empat orang anaknya, dan bahawa dia akan mengaku salah awal-awal lagi jika pertuduhan dipinda sebelum perbicaraan bermula. Di hadapan hakim-hakim rayuan di sini, peguam tertuduh berhujah bahawa tertuduh, sebagaimana biasa, sepatutnya diberi diskaun kerana mengaku salah, dan oleh yang demikian, hukuman maksima yang dijatuhkan yang arif hakim adalah di luar aturan – memandangkan hukuman mandatori minima di bawah s. 39A(2) adalah lima tahun penjara.

Diputuskan (menolak rayuan)
Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah:

[1] Walaupun ia adalah satu peraturan amalan bahawa seorang tertuduh - yang mengaku salah kepada kesalahan terhadap mana ia dituduh - harus diberikan diskaun berbanding hukuman yang mungkin dijatuhkan terhadapnya jika beliau disabit selepas suatu perbicaraan, terdapat beberapa pengecualian bagi peraturan am ini. Malah, kesalahan-kesalahan di bawah Akta Dadah Berbahaya 1952 adalah terkecuali dari peraturan ini. Kerajaan dan Badan Perundangan telah mengambil berbagai langkah serius untuk mengawal ancaman pengedaran dadah serta jenayah-jenayah yang berkait dengannya, dan mahkamah perlu memainkan peranannya dengan menjatuhkan hukuman berat seperti yang ditetapkan oleh ADB.

[1a] Jumlah heroin yang dijumpai dalam motorkar tertuduh amatlah besar, iaitu 13.75 kg. Dengan demikian, ini adalah satu kes luar biasa di mana tiada diskaun hukuman patut diberi kepada tertuduh walaupun beliau telah mengaku salah kepada pertuduhan terpinda. Tidak ada kesilapan undang-undang pada hukuman yang dijatuhkan oleh hakim bicara.

Hukuman yang dijatuhkan hakim bicara disahkan.]

Case(s) referred to:
Loh Hock Seng & Anor v. PP [1980] 2 MLJ 13 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Oo Leng Swee & Ors [1981] 1 MLJ 247 ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B

For the accused - Hazman Ahmad; M/s Raja Badrol Hazman
For the prosecution - Shahrizal Shaari DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-27-98]

Reported by Gan Peng Chiang

JUDGMENT

Mokhtar Sidin JCA:
The appellant appealed against the sentence imposed on him by the High Court when he pleaded guilty to an amended charge under s. 12(2) of the Dangerous Drugs Act 1952 (the Act) which is punishable under s. 39A(2) of the Act. He was sentenced to life imprisonment and ten strokes of the rotan. We have dismissed the appeal earlier and we now give our reasons for doing so.

The facts of the case. The wife of the appellant, Lew Sin Kiow, was the owner of the semi-detached house No. 39 Jalan Hujan Emas, Taman OUG, Kuala Lumpur. She and her family stayed at another semi-detached house No. 41, but this house was not attached to house No. 39. Apparently, the two houses were separated by a fence. On 25 March 1997, she entered into a sale and purchase agreement to sell house No. 39 to one Chan Poh Lan. Chan Poh Lan took the keys to the house from Lew Sin Kiow to do some renovations and when the renovations were completed the said Chan Poh Lan returned the keys to the appellant's wife because the said Chan Poh Lan had not paid the full purchase price. Only on 20 August 1997, the said Chan Poh Lan obtained the keys to the house from her solicitors. The appellant bought a BMW car bearing registration number WCV 2088 from Aw Ka Theam sometime at the end of 1995 or early 1996. The said Aw Ka Theam handed over the registration card together with the transfer form (Form K3) to the appellant to enable him to register the car in his name. For some reason best known to him the appellant did not do the necessary transfer to have the car registered in his name.

On 1 June 1997, ASP Perumal s/o Alagan received information in respect of drug activities involving the two houses stated above and a car at Jalan Hujan Emas, Taman OUG, Jalan Kelang Lama, Kuala Lumpur. He then organized a police raiding party which was divided into three groups. At about 9pm on that day, the police party arrived at the scene of incident. They identified houses No. 39 and 41 Jalan Hujan Emas and carried out observation on those two houses for about 15-20 minutes. The police noticed that the car No. WCV 2088 was parked at the porch of house No. 39. The gate to this house was closed. Only the lower part of the house was lighted. The police also observed that the upper and lower parts of house No. 41 were lighted and at the porch there were two cars bearing registration Nos. WBD 22 and WCX 3015 parked there. The gate to this house was also closed. The police party which was divided into three groups stationed themselves at various points already identified by them. At about 9.40pm the three groups entered the two houses simultaneously and they identified themselves by shouting "Polis, Polis, Polis". ASP Perumal saw the appellant who was only wearing short pants running from the front part of house No. 41 towards the wall that separated house No. 41 and house No. 43. The police gave chase and caught the appellant. In house No. 41 the police arrested another male Chinese person who was attempting to run upstairs. The appellant, when he was cornered by the police, took out something from the pocket of his short pants and threw it on the ground. The police recovered that article which happened to be the key to car No. WCV 2088. The police conducted a search on the car. Inside the car the

police recovered the registration card of the car and a document from Kurnia Insurance. Using the same key the police attempted to open the boot of the car but was unsuccessful. The police then asked the appellant to open the boot. He refused to do but after some persuasion he opened the boot with the same key. Inside the boot the police recovered a dark-blue-coloured bag with the zip half opened. The police took out the bag from the boot of the car and placed it on the floor of the porch where the bag was opened. This was done in front of the appellant. Inside the bag, the police found 40 plastic packets which the police suspected to contain heroin. The police then conducted a search on houses No. 39 and 41 but found nothing. The police also conducted a search on cars Nos. WBD 22 and WCX 3015 but found nothing. The police then placed the appellant under arrest and took possession of the dark blue-coloured bag and its contents, and the BMW car bearing registration No. WCV 2088. The police then took the appellant, the dark-blue-coloured bag and the car to Balai Polis Jalan Travers, Kuala Lumpur, where a police report was lodged. The 40 plastic packets were sent to the Chemistry Department for testing. After analysis, the chemist found that the contents of the plastic packets were heroin weighing 13,749.80 grammes.

The appellant was then charged under s. 39B of the Act which carries a mandatory death sentence. The appellant claimed trial to the charge and the trial was held before the learned trial judge. At the close of the defence the learned trial judge, amended the charge to one under s. 12(2) and punishable under s. 39A(2) of the Act. The appellant then pleaded guilty to the amended charge. In his plea of mitigation before the learned trial judge, the appellant stated that he was 47 years of age then, married with four children and that he was the sole breadwinner in the family. He asked the court to take into consideration the fact that he had pleaded guilty to the amended charge. He also stated that he would have pleaded guilty earlier if the charge had been amended before the commencement of the trial and that would save the court's time. The learned judge then imposed the sentence of life imprisonment which is the maximum sentence that could be imposed and ten strokes of the rotan which is the minimum mandatory whipping sentence under s. 39A(2) of the Act. Being dissatisfied with that sentence the appellant appealed.

Before us, Encik Hazman Ahmad, the learned counsel for the appellant, submitted that the appellant should be given some discount on the sentence because he had pleaded guilty and as such the court should not impose the maximum sentence of life imprisonment. In imposing the maximum sentence of life imprisonment the learned trial judge was in error. He then cited the decision in *Public Prosecutor v. Ravindran & Ors* [1993] 1 MLJ 45 where it was held:

(2) The court should also have regard to certain accepted principles or guidelines so as not to have too great a disparity in sentence for the same offence. These guidelines were: discount or credit for the plea of guilty, comparison of sentences in other courts in other cases for a similar offence; disparity of sentence amongst accused persons and mitigating factors relevant to the present case.

(3) It is an accepted rule of practice that an accused should be given credit or discount for pleading guilty. This is because public time and money will be spared if an accused admits his guilt. The credit or discount to be given to an accused person is not on the maximum sentence imposed by law rather on a sentence which would have been imposed on the accused if he had claimed trial and been found guilty.

At pp. 51 and 52, Visu Sinnadurai J said:

Discount or credit for the plea of guilty

It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. The rationale for this rule is that much public time and money will be spared if an accused admits his guilt, thus avoiding a prolonged and unnecessary trial. This rule however, is not a strict rule as the courts may, in exercise of their discretion, in exceptional cases, refuse to grant any discount: see for example *Lee Say & Ors v. PP*.

In *McLoughlin and Simpson*, the English Court of Appeal in declining to reduce a 15-year sentence passed on two defendants with very bad criminal records who had forced their way into a woman's flat and raped her at knifepoint said:

> But this is an unusual case; and in the circumstances, although there was a plea of guilty; it seems to us that it would not be right to interfere in any way on that ground (of granting a discount) with the sentences which were passed.

In *R v. de Haan*, at p. 619 Edmund Davies LJ said: 'It is undoubtedly right that a confession of guilt should tell in favour of an accused person, for that is clearly in the public interest.'

The general rule that an accused person who pleads guilty is entitled to a discount was applied by our Supreme Court in *Mohamed Abdullah Ang Swee Kang v. PP*. The Supreme Court adopted with approval the views expressed by Cumming-Bruce LJ in *R v. Boyd* where he said:

> The policy of the court is that where a man does plead guilty, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty.

Similarly in the earlier Federal Court decision of *Sau Soo Kim v. PP* at p. 137, Lee Hun Hoe CJ (Borneo) said:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country the great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses.

The Supreme Court in *Abdullah Ang*'s case also held that a plea of guilty will entitle the accused person to a discount of between one-quarter to one-third of the sentence. Mohamad Azmi SCJ in delivering the judgment of the Supreme Court said at p. 171: 'It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence'. His Lordship also pointed out that failure on the part of a judge in not granting credit or discounts may result in the judge not exercising his discretion in sentencing judicially.

The credit or discount to be given in favour of the accused person is not on the maximum sentence imposed by law but rather on a sentence which would have been imposed on the accused if he had claimed trial and had been found guilty. Cumming-Bruce LJ in *R v. Boyd* above said: 'So one asks oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence?'

It is true that the general rule is, when imposing a sentence, the court should take into consideration the fact that an accused person who has pleaded guilty be given certain credit and discount, but we are of the view that there are exceptions to this rule. In our opinion, one of these are the offences under the Dangerous Drugs Act 1952. The Government and the legislature have taken very serious views in the abuse of usage of dangerous drugs. Drug addictions are rampant and the Government as well as the legislature have tried to curb these addictions especially amongst youths but met with little success. Death sentences and heavy penalties have been introduced but we find drug addicts everywhere. The addiction to drugs have led to other offences such as thefts, burglary and snatch thefts. Some of these offences lead to serious consequences. We have read in the newspapers that some drug addicts have gone to the extent of hurting their own families such as their mothers, sisters and grandmothers in order to get some money to purchase the drugs to support their addictions. Recently, a woman died when a snatcher snatched her handbag and she was dragged together with the handbag some distance away and as a result of that she died.

In our view, the source of all these evils are the drug traffickers and the drug peddlers. They are the ones who have been trafficking, selling and peddling the drugs to those drug addicts. It is public knowledge that the return in this type of business is very lucrative.

The seriousness of the offences on drugs have been made known since the seventies. Eminent judges have expressed this in so many cases. In *Public Prosecutor v. Oo Leng Swee & Ors* [1981] 1 MLJ 247 at p. 248, Suffian LP (as he then was) stated:

> It is true that all the accused are first offenders. But drug addiction has been rampant for many years, and has reached very serious proportions. It is notorious that many addicts are young persons, many of them innocent children of decent families. Many addicts because of their craving are driven to commit crimes, in order to acquire money desperately needed to buy dadah; and almost daily we read reports of young men on motor-cycles snatching ladies' handbags in town in broad daylight – or worse. Many of these addicts are eventually destroyed by the deleterious effects of the drugs which they are not able to shake off, but before that lamentable event they go through living death.

Raja Azlan Shah, CJ Malaya (His Majesty as he then was) in *Loh Hock Seng & Anor v. Public Prosecutor* [1980] 2 MLJ 13 had this to say at p. 14:

> Notwithstanding the several convictions for trafficking in drugs that have been secured, the rampancy of the this type of offence still continues unabated with sequential impetus to related offences under the Ordinance, and in view of the current and continuing upsurgence of indulgence in dangerous and deleterious drugs and offences relating to and connected therewith, we feel the time has now come for some more vigorous element of deterrence to be brought to bear upon those trafficking in drugs, both active and potential, who are no less than engineers of evil and pedlars of death, to the intent and extent that intending offenders should be made to desist and be deterred, that those one step ahead and in the course of promoting or participating in such heinous activity should realise the extremely grave consequences they face, stop dead in their tracks, repent and resile, and that those who, notwithstanding still pertinaciously persist and have the misfortune of being apprehended, should know they are in for the punishment prescribed by law to fit the crime. As was said by Abdoolcader J, in *Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* trafficking in drugs strikes at the very core of public order, and he went on to add (at page 88):
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> > Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquility and society generally.

The effort of the legislature to curb and deter drug-related offences is well described by Hashim Yeop A. Sani (as he then was) in *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257:

In respect of offences under the Dangerous Drugs Ordinance, 1952, there has been a gradual change in the attitude of the legislature during the last few years. The Ordinance has been amended by Parliament a number of times in 1971 (by Act A112 of 1972) then in 1973 (by Act A194 of 1973) and then in 1975 (by Act A293 of 1975). At the moment there is yet another amendment which is awaiting the Royal Assent. In the legislative exercise in 1973 penalties attached to the various offences under the law were enhanced. For the offence of possession of any dangerous drugs under section 12(2) of the Ordinance, for example, the penalty was increased from a maximum of $10,000 fine to a maximum of $20,000 fine and the maximum imprisonment was increased from three years to five years. In the legislative exercise in 1975, among other things, a new provision (new section 39A) was inserted whereby it is provided that whoever is convicted of an offence under the Ordinance and the subject matter of which is heroin or morphine of five grammes or more in weight shall be liable to imprisonment (with no option of a fine) for a term not exceeding fourteen years and not less than three years and he shall also be liable to whipping of not less than six strokes. According to the Bill which is at the moment awaiting the Royal Assent another new provision is inserted creating a new offence of planting or cultivating any plant from which raw opium, coca leaves, poppy-straw or cannabis may be obtained. The punishment for the new offence is life imprisonment and whipping.

It is common sense to say that behind these legislative exercises was the government's realization albeit gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest.

The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v. Kenneth John Ball* as follows:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer

> easy money on the supposition, that if the offender is caught and brought to justice the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

As can be seen from the above, the Government and the legislature have taken various steps to curb drug activities and we believe that the courts should also help to curb these activities by imposing stringent punishments provided by the law. In *Loh Hock Seng & Anor v. Public Prosecutor (supra)* at p. 14, Raja Azlan Shah CJ (Malaya) stated:

> There has been several convictions in the country for trafficking in drugs under section 39B of the Ordinance but the courts have invariably sought out a sense of compassion to exercise mercy and have imposed accordingly only the second alternative of a sentence of life imprisonment, and we understand that this is the first time in which the Public Prosecutor has appealed against the imposition of such a sentence, no doubt in respect of the 2nd appellant in view of the facts and circumstances surrounding and relating to his case.
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> Sentencing in a criminal case must of course bear relation to the particular circumstances of the offender as well as the particular circumstances of the offence. The legislature has in its wisdom and in the implementation of its plenary powers in this respect enacted the imposition of the alternative penalties of death or imprisonment for life under section 39B of the Ordinance with the option and discretion in this regard to be no doubt judicially and judiciously exercised according to the facts and circumstances of a particular case, and we can see no reason whatsoever why the statutory enactment of the option for punishment by death cannot and should not be made functionally operative and exercised and applied *proprio vigore* if the circumstances and facts of the case so warrant, justify, require and perhaps even demand.

Suffian LP in *Public Prosecutor v. Oo Leng Swee & Ors (supra)* at p. 248 stated:

> The learned trial judge in a careful judgment explained why he refrained from sentencing the accused to death and took everything in favour of the accused into account, in particular the fact that each of the accused had pleaded guilty. We agree that a plea of guilt should be taken into account in favour of the accused. But he had failed to take into account the very pertinent fact that the accused were all caught in the manufacture of heroin.
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> In our view these accused should have been sentenced to death, notwithstanding that they were first offenders and had pleaded guilty – because they were engaged in manufacturing and manufacturing in a systematic and a big way (they admitted they were paid $1,200 a day); and without manufacturers, there would not have been traffickers and pushers; and without any of these people engaged in this deadly business there would have been no or fewer consumers – to save whom, parents and relatives suffer mental anguish and Government spend time and money which could very well be expended in developing the economy and increasing the prosperity of the country.

Turning back to the present appeal, the appellant was originally charged for trafficking in dangerous drugs under s. 39B of the Dangerous Drugs Act 1952 which carries a mandatory death sentence. He claimed trial to the charge and as a result of that a full trial took place. At the end of the trial, ie, at the close of the defence case, the learned judge amended the charge to one under s. 12(2) of the Act and punishable under s. 39A(2) presumably due to lack of evidence of trafficking. The appellant then pleaded guilty to the lesser charge. In admitting the facts, the appellant also admitted that the heroin amounting to 13,749.80 grammes was found in his car.

In our view, 13,749.80 grammes (13.74 kilogrammes) of heroin is a huge amount. One can just imagine the amount of damage done if this heroin found its way to the public at large. It would cause hundreds if not thousands of drug addicts more miseries and some of them, deaths. The appellant, if he had been successful in distributing and selling the heroin, would be laughing all the way to the bank. We are of the view that this is one case in which no credit or discount should be given even though the appellant had pleaded guilty to the amended charge. In our view, the appellant was fortunate that the prosecution failed to prove trafficking which carries the mandatory death sentence.

We have gone through the judgment of the learned trial judge and we cannot find any error in his judgment when he imposed the maximum punishment available under s. 39A(2) of the Act. We would say that the learned judge would have committed a grave error if he did not impose the maximum sentence.

For that reason, we found there is no merit in this appeal and we hereby dismiss the appeal. The sentence imposed by the learned judge is hereby affirmed.